

HOW I TAUGHT LAW AND ECONOMICS

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EDITOR'S NOTE: *

Introduction

I taught graduate law and economics for some years at Michigan State University. Technically it was listed either under Public Finance, in which field I had taught graduate and undergraduate Public Expenditure Theory for some years, or as a free-standing course (not within a field). The actual title of the course, Economics 819, was Economic Role of Government. The catalog description of the course read: Analysis of fundamentals of economic role of government with focus on social control and social change; legal basis of economic institutions; applications to specialized problems and institutions. The specific objectives of the course were three:

1. Insight into the “fundamentals of the economic role of government” beyond spending and taxing per se.
2. Insight into the problems of studying the fundamentals of the economic role of government: sources and conceptual, ideological and substantive materials.
3. Identification and mastery of several alternative approaches to the economic role of government, or to “law and economics.”

I taught the course once a year for over ten years, sometimes during the regular academic year and sometimes during the summer. After technically retiring I taught the course each Fall for several years.

1. INTRODUCTORY LECTURES

The specific approaches comprising the course are (1) Neoclassical, which has two strands, Pigovian and Paretian; (2) Institutional; (3) Critical Legal Studies; and (4) Marxian; these were briefly elaborated upon. The principal focus, however, was said to be on the juxtaposition of the Neoclassical and Institutional approaches through readings and lectures. The Neoclassical approach is presented in detail in Werner Z. Hirsch's textbook, *Law and Economics: An Introductory Analysis*. 2nd ed., 1988,

* Warren Samuels has been one of the world's foremost economists in recent decades. In this paper – which supplements his earlier paper in this *Journal* on the teaching of HET – he reflects on his experiences in the teaching of law and economics, and considers a range of issues others may draw on to broaden and deepen courses elsewhere.

and is richly summarized in Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post-Modernism*, 1997. The neoclassical approach will be presented and critiqued in the lectures. The lectures, coupled with the other texts, will examine in depth the Institutional approach.

At this point I felt it incumbent to caution the students, for this course will be unlike any they have ever had and certainly like no other in our program. I also say that I will be making a wide range of introductory points in order to indicate something of the range and the content of what we will be covering in the course. These points will sometimes be reiterated, in order to suggest that they relate to other points in an extremely complex analysis, and to suggest something of how they relate.

Before I summarize the cautions, I should now take notice of two reviews of my *Economics, Governance and Law* (Northampton, MA: Edward Elgar, 2002) by reviewers who certainly understood what my approach was all about¹. Richard Sturn employs a distinction made by Abba Lerner in an article which I had read when it was published and had since forgotten. Lerner argued that “an economic transaction is a solved political problem”, the latter involving “essentially the transformation of the conflict from a political problem to an economic transaction” (Abba Lerner, “The Economics and Politics of Consumer Sovereignty,” *American Economic Review*, Papers and Proceedings, vol. 62, no. 2 (May 1972), 258-266, p. 259). Sturn perceptively holds that my position argues “that what Lerner calls ‘political problems’ are never ever ‘solved’ once and for all” (Ricard Sturn, Book Review, *The European Journal of the History of Economic Thought*, vol. 11, no. 2 (Summer 2004), pp. 328-30, p. 328). Sturn further argues that I “challenge the foundational choice of problems” by both “mainstream economic analysis” and “all currents of politico-economic thought which combine two commitments: (i) a commitment to some form of individualism; [and] (ii) a commitment to the view that it belongs to the professional task of economists to provide the theoretical basis for the translation of as many conflicts as possible from contested political problems into economic transactions whose desirability can be determined solely in terms of efficiency.” Sturn perceptively carries my argument further:

To conceptualize political conflict primarily as something we ideally should and perhaps could get rid of, ‘obfuscates’ ... the fact that under modern conditions government, governance and policy are inevitably important, ubiquitous and activist. In modern reality, there is no uncontested realm of law, property

¹ When I say “my approach” I really have in mind the approach taken by a number of people, notably A. Allan Schmid and Daniel W. Bromley.

and voluntary exchange and market whose anchors and boundaries are settled by rules once and for all: the battle-cries in favor of de-politicization and deregulation are as political as regulation itself. 'Politicisation is inevitable' ... Theories suggesting the minimization of political regulation and governance are based on an untenable ontology and typically function as ideologies serving the interests of particular groups. All important rules and norms are essentially and permanently contested. Reasoning which promotes the minimization of the scope of politics as a social ideal rests on demonstrably false premises. But it may alter the direction of political decision making and its distributional impact. These ideologies are built on ontological illusions yet may have real effects within the political and legal process itself ..." (p. 329)

In the second review of my book, Peter Boettke summarizes my view of "the complex reality of the interaction of polity, economy and society" thus:

- 1) Government is an instrument of social control and can be, and will be, used by whoever can get in the position to use it for their benefit;
- 2) What we perceive as the economy emerges out of the complex institutions and processes that are worked out in the legal economic nexus;
- 3) The policy debate is never about government intervention or not government intervention, government intervention is omnipresent and thus the question is always about the change of the interests whom government is used to support. (Peter Boettke, Book Review, *History of Economic Ideas*, vol. XI, no. 3, 2003, pp.156-58, p., 157.)

Sturn and Boettke get my position right; too bad the reviews (and my book, of course) had not been available to help with my cautions. What I identified as my "preliminary cautions" ran along the following lines (a composite of two sets of introductory notes) much of which involves how the Institutional approach differs from the Neoclassical approach.

The course will aggravate some students because it explores the fundamental importance of government for the economy and because it attempts to reach no conclusions as to the proper role of government or as to the correct specific policies of government. For example, in affirming that government will necessarily promote certain interests rather than others, it is intended to say nothing as to whose interest will count and be promoted by government-except to affirm that government will promote

certain interests rather than others even when it superficially appears that it is not.

I then said that two distinctions had to be made: one between explanation and justification, and the other between language which describes and language which attempts to motivate psychologically for the purposes of power. I said further that I will appear cynical in discounting various claims, that I admit to a great deal of cynicism; and that no implication for or against a policy should be drawn when rendering such distinctions and claims.

Two important dichotomies were emphasized. One juxtaposes liberal democratic society in the abstract to the specifics of freedom and control, and continuity and change, in actual institutionalized systems. The second distinguishes pure abstract a-institutional conceptual markets from actual markets that are a function of the institutions which form and operate through them. Actual markets, furthermore, are a function of the structure and policies of firms and of the legal and moral framework. I then posed the problem of equating the pure conceptual market with the actual institutionalized market: this is equivalent to privileging the actual market, and therefore the structure on which it is based. Correlative thereto are the further problems, (1) identifying optimality solely on voluntary exchange within the existing market, when the pure theory may or may not apply to it and may apply to others; and (2) using existing prices and costs, thereby giving effect to the existing market and the structure on which it is based.

The foregoing brought me to several key propositions. (1) Neoclassical economics explains resource allocation as a function of the market, which is a function in turn of demand and supply, whereas Institutional economics lengthens the explanatory chain by adding, "... which is a function of power structure, which is a function of relative legal rights, which is a function of government, which is a function of who controls and uses government to promote their interests; (2) Most questions of legal-economic policy are matters of legal change of the legal framework; (3) Law and government are objects of use to control and change actual markets; (4) Markets are not neutral; how they operate depends in part on who controls their legal foundations; (5) Neither market nor rights are independently constituted; they are, rather, instituted and changed through social construction; (6) Government is not external to the economic system: government is what it is because of the economic system, and the economic system is what it is because of government; both are a function of the legal-economic nexus; (7) Propositions about the economic role of government likely reflect and give effect to an attitude or sentiments and not legal-economic reality, but nonetheless can influence the social construction of reality; (8) The overriding principle is that of the use of government: government is an instrument, or tool, available for the

use of whoever can control it; (9) Government can be an instrument of the powerful, or a check on the power of the powerful, or both; (10) The economy is a process in which (a) utility maximization within a given legal structure and (b) efforts to change the legal structure are jointly and interactively worked out.

Several false or misleading dichotomies were pointed out: (1) Nonintervention or laissez-faire versus reform: Legal change of law is the central problem; law is not intruding into a situation in which it hitherto has been absent but, in changing or reforming the law, etc., government is changing the interest to which it is giving its support. The problem is not government versus no government, but which interests government is used to protect and which to inhibit. (2) Regulation versus deregulation: Regulation protects Alpha from Beta; deregulation protects Beta from Alpha. The status quo point denotes one rather than another structure of rights (interests protected by law), one rather than another derivative price and cost structure, one or another set of externalities, and one or another allocation of resources. When the issue is whose interest is to count, some notion of public purpose or social welfare, etc., is needed. (3) Polity versus economy: The two are not only mutually interdependent, they both emanate from a common legal-economic nexus.

Jockeying for positions of power from which to control government typically involves obfuscation: obfuscation that the jockeying for position is going on, that the legal-economic nexus exists and is continuing to generate legal change, that rights and the status quo are selectively being treated as natural or absolute, of the fundamental role of government as a mode of social control through, in part, social purpose.

The students are asked to consider in their own minds the usual propositions centering on self-interest and its maximization or optimization. These propositions can have several meanings: (1) A definition of reality, as to how people actually behave. But this tends to be tautological: whatever is pursued as self-interest is self-interest because it is pursued. (2) A methodological limiting assumption. (3) A normative “ought.” Furthermore, is self-interest the driving force or is it a check on the driving force—or both? Consider also the proposition that we should do away with any barriers to trade. I tell of my undergraduate students who think that there should be a market for everything and that government should not intervene. I point out, first, that markets require laws; the free market is not devoid of law. Second, when I respond by proposing that grades will be sold to the highest bidders, quiet reigned supreme in class. (4) A “free market” can exist, but with what institutions, with what structure of power?

I indicate that the foregoing both stands on its own and constitutes a critique of Neoclassical law and economics. Moreover, I emphasize (1) the

fact of the social construction of legal-economic reality, rather than positing an independent, given, and self-subsistent system; (2) the legal-economic nexus from which emanates what we conventionally, and selectively, designate the economic and the political, or the private and the public, spheres; (3) the psychic balm (emotional comfort, setting minds at rest) and social control (including legitimization) functions performed by presuming a given, eternal system, which also abets those with interests in status-quo legal-economic arrangements; (4) that law and policy are not as different as one might imagine, i.e., law is policy and policy is a mode of making law; and (5) that policy is a result of partisan mutual adjustment (bargaining, in various forms and within various structures, the structures themselves both a matter and an object of policy).

I suggest that hysteria about government is vain and an empty form of amusement, anxiety and/or manipulation. The real problems are those as to choice of the organization and control of the economy, i.e., of access to, use of, and the effects of, power. As for our being economists and not legal scholars, I stress that law is not a private mystery into which none but the lawyer can enter.

I endeavor to make clear to the students that I intend for them to master and acquire an ability to work with or within each of the approaches and to apply each approach to some common problem. This mastery requires them to conduct a continuing exercise in the analysis of texts and involves identifying the selective perception and choices involved in both making policy under them and in making sense of them. Again I caution the students that this approach will raise questions about their belief system. Normally it is in respect to these questions that the belief system functions as a protective belt. But here we tend strongly to challenge student belief systems in order to get to the fundamentals of what is going on in the working out of the economic role of government. I reiterate that, counting lectures and all the readings, the course is intended to cover multiple perspectives. My own personal perspective is not affirmed to be "correct" but it will inevitably govern what I have to say.

I suggest the matrix approach to meaning. You have a question, and you have five or six different views on that question-say, five different approaches. And within each approach, you have several different subsidiary views; branches, as it were. So you have A, B, C, D, and E and within each of them you have, say, C1, 2, and 3. So what is the object X? Is the object X to be understood by A or by B or by C, or A1 or A3 or D3? It seems to me, even if I were to believe that E3 is the correct one, that if I look at the world, what's really going on out there, without putting myself and E3 at the top of a pyramid, is a matrix of positions, and that there likely must be something to be learned from the matrix formed by all these positions.

Typically I again discussed the several approaches. In the Marxian approach, for example, I identify the functions of government to be (1) an instrument of class domination, (2) a facilitator of capital accumulation, and (3) a rationalizer and protector of the system. Apropos of neoclassicism I reiterate some of the assumptions required in order to reach unique determinate optimal equilibrium solutions to problems of resource allocation. I indicate some problems of Neoclassical and Marxian economics, for example, whether or not the economy is independent and self-subsistent; whether the economy is more than the market, i.e., whether markets are to be understood in pure, a-institutional conceptual terms or in terms of the institutions/power structure which form and operate through them; and the need for some assumption as to the relationship of a theory to the status quo system and structure.

The Institutional approach is said to put emphasis on the factors and forces at work in the economic, or legal-economic, process with regard to (1) the organization and control (power structure) of the economic system and its evolution; and (2) resource allocation (etc.) with a wider scope of variables and longer chain of reasoning, and not on unique determinate optimal equilibrium solutions. As for the latter, I urge that there is no such solution, only optimal etc. solutions specific to the structure of rights-rights determined by and through government (including the legal system), i.e., through the uses to which government/legal system is put.

I note that all approaches (1) share an instrumental view of the state, (2) have different values and definitions of reality, for example, accepting or rejecting the logic and ontological status of the market, or capitalist, economy; and (3) that the affirmative theory of each constitutes an approach to the use of government.

The lectures continue with a wide ranging survey of relevant methodological concerns.

I distinguish methodological and normative individualism and collectivism. As to normative individualism and normative collectivism, I indicate that the following questions necessarily arise: (1) which individuals (2) within what structure and (3) that performance is, *inter alia*, a function of structure. I identify the problem of structure versus results in part thusly: That on any topic we tend to (1) make assumptions as to structure, or seek agreement on structure, further assuming that whatever results thereof arise will be deemed acceptable; or (2) identify desired results and thereby assume and legitimize whatever structure will yield the desired results.

As to methodological individualism and methodological collectivism, I point out (1) that use of the market ("the market works") involves a social welfare function, either explicit or implicit; (2) that the market produces an efficient allocation of resources as a function of efficiency being defined in

terms of free market adjustment; (3) that the content of the legal framework is often the point at issue; (4) that individuals may pursue the maximization of their self-interest, but that preferences and interests are learned (treated as given by the analyst but not given in actual economies); (5) that the use of the Pareto-criterion has the effect, if not the intent, of protecting either the existing or some assumed power structure; and (6) that one problem is that of the definition of output, and that in many cases what defines a product-output is stipulated in law.

The positive and normative distinction is reviewed (1) in terms of what is vis-à-vis what ought to be; and (2) that one cannot derive an ought from an is alone, that additional normative premises are required. A distinction is drawn between positivism as being concerned with what is and a conditional positivism as being with what is necessary to achieve a particular normative goal.

The role of economic theory as a rationalization of the market system is underscored using a quotation from Kenneth Arrow and Tibor Scitovsky, *AEA Readings in Welfare Economics*, 1969, p. 2: "Modern economics developed more or less as the rationalization of the laissez-faire economy, hence its preoccupation with the private sector and the operations of the market in the private sector."

Instead of treating law as unimportant, as a given, as dysfunctional, and/or as exogenous to the economic system, the emphasis in this course is on the importance and ubiquity of law. All aspects of life must be seen to have a pertinent body of law. New developments, such as new technology, introduce new relationships between people, and law is called upon to identify and protect as rights the respective interests of the parties. An example is the technology that enables surrogate motherhood or parenthood (disposition of frozen embryos). This introduces novel situations and conflicting claims of interest, the need to establish who has what rights and duties, and to whom. Competing analogies with existing laws are drawn, driven in part by premises as to whose interest should count, and how.

Specifically with regard to the lectures, several characteristics are identified:

- (1) The point of view is said to be radical in the sense of dealing with fundamentals. Government will be shown, whether we like it or not, to be deeply involved in the definition and creation of the economy. Also to be shown are the efforts that are continually being made to obfuscate the role of government in defining and creating the economy so as to selectively channel both the definition and the (re)creation of the economy, efforts that are willy nilly a part of the processes of definition and (re)creation itself. Among these efforts are the pretense that rights are absolute and an

emphasis on the quantity theory, the gold standard, inflation as an issue, all in order to “limit” the economic role of government. Whereas rights are not absolute; they are relative to each other and to the processes of government through which they are chosen and remade; and the gold standard etc. each involves government. The proximate critical matter is almost always the legal change of law, that is, the change by law of the interests to which government is to give its support. Government is inexorably involved in the status quo, and the question is that of the change of the details of that involvement. Although the economy and polity are typically comprehended as essentially self-subsistent and independent, albeit interactive spheres or processes, there is a “legal-economic nexus” in which both originate in an ongoing manner.

- (2) As already indicated, the point of view encompasses twin interactive processes: the working out of optimal solutions through inter-agent trade, and the restructuring of rights.
- (3) The materials of the course are exceedingly complex, requiring some redundancy.
- (4) The course, at least the lectures, will dissatisfy some students, because no attempt will be made to reach solutions to problems of policy. The focus of attention is on examining what is going on in the world of policy. No assumption is made that a unique determinate optimal solution must be reached for any problem of policy; nor is it assumed that the instructor’s position on policy should be given a privileged solution. The further focus is, instead, on the process of working out solutions to policy problems.
- (5) In the history of economic thought one finds varying combinations of (a) economic theory and (b) valuational paradigms that produce varying explanations of how the economy works and what policy (law) should be. This is neatly illustrated by Malthus and Ricardo both using their theory of rent plus each author’s own valuational paradigm in order to produce systems of economic thought affirming the status, for Malthus, of landed property and landed gentry, and, for Ricardo, of nonlanded property and business class in relation to the Corn Laws.

I next commence examining legal-economic complexity, pointing out that one can treat legal and economic systems as conceptually and/or substantively separate but in actuality the legal and economic systems are

neither separate nor merely interactive but are mutually determining. This I first explore through several dualisms, propositions each of which is true but which state conflicting points:

- i. Law is a function of the economy; the economy is a function of law.
- ii. Private is a function of public; public is a function of private.
- iii. Property rights: their private exercise is in part the basis of their ratification by government, through governmental choice, such that private exercise is a function of government; government is in part a function of the private exercise.
- iv. Government “protection of property”: property is protected because it is property; property is property because it is protected.

I continue my introduction with the identification of an initial problem: which differences in approach are due to the nature of the subject matter itself, and which are due to varying world-views, varying ideologies, varying analytical techniques and varying logics of modeling being superimposed on the subject matter? The subject matter has many, and many changing, facets and can be viewed differently from varying perspectives, and is in fact viewed differently from varying perspectives. Each different perspective tells, or is used to tell, a more or less different story. The sources or bases of variation include different conceptions of law, economy, the relation of the individual to law and to the economy, commodities; etc. Different paradigms generate different modes of discourse; and different modes of discourse generate different paradigmatic accounts of the relevant social world (what is relevant varying from approach to approach). Accordingly, there are different views as to what a theory of law and economics should do or try to do.

Three different sets of paradigms are identified: With regard to society as a whole: harmony versus conflict. With regards to distribution: productivity, exploitation, appropriation. With regard to man and reality: free will and determinism.

With regard to determinism I explain the relevance of philosophical and scientific realism. I make the point that the realist ends up in much the same position as the idealist, namely, having to choose, because even if everyone was a realist (philosophical or scientific) they would still disagree as to the content of reality. With regard to free will, I argue that it takes place within institutional and other constraints.

Apropos of all of the foregoing, I suggest that much of what one can read amounts to legitimization, either of particular arrangements or of the system as such.

One principal point is that we should differentiate the world of “real” fundamentals from the world of ideological perception and manipulation, or from perceptions superimposed on the real world, by which real world is made sense of and with which it is changed. In the domain of law, one can juxtapose practice laden with ideology to technique, with the latter also laden with ideology, in part through implicit ideological premises.

A second principal point is that the multiplicity of approaches, ideological positions, and definitions of reality yield the fact and importance of an inexorable bargaining process in which pragmatic solutions are worked out. The idea of things being worked out is a centerpiece of my approach to the economic role of government. And at the heart of the process of working things out are multiple selective perceptions and multiple definitions of reality, such that a necessity of choice characterizes and drives the working-out process.

This brings me to the problem of defining versus creating social “reality”. Law provides, and is predicated upon, a definition of social reality; law also is a system of social control functioning in the creation of social reality. Law is not only social control; it also functions as psychic balm in the face of existential and social ambiguity and uncertainty. We thus next encounter the problem of whether law-common-law rules, legislation, constitution-is found or made. The successful legitimization of the legal system and of law in general, plus not unrelated belief in a “higher law” accounts for the idea that law is found, being transcendent to anything man can make. This problem parallels that in theology as to how much is due to God and how much, if anything, is due to man.

Within the problem of defining reality is another, namely, decision making and/or legitimization by appeal to the intentions of the “founding fathers.” That term relates to those who framed the Constitution, though it can alternatively relate to those who ratified the proposed Constitution. Invocation of the founding fathers is a rhetorical stratagem, a means of establishing privileged status for the views selectively attributed to them. The entire exercise can be critiqued on several grounds, for example, why the present generation need be bound by the definition of reality and the legal rules purportedly held by an earlier generation, and the historiographic difficulties of identifying past belief systems without selectively projecting present beliefs.

It is important for analytical purposes to contemplate law as choice and apropos the definition of reality projected by law, to identify the use of pretence as social control and legitimization.

Law must be seen as language. Legal concepts are embodied in words that are selectively defined and selectively applied. These concepts and words are used in the process of defining and (re)making economy and society, as if words had independent meaning which we were trying to achieve. The legal system and the economy are artifacts, both influencing and influenced by concepts ensconced in words. On the one hand, we encounter reification, or the fallacy of misplaced concreteness or the naturalistic fallacy, namely treat what is materially an artifact as if it were part of the natural order of things. On the other hand, we encounter the multiple possible readings of the texts of constitutions, legislation and court decisions. We also encounter, in both, the importance of belief system and selective perception in working out the substantive content of law and the legitimization of law and legal system.

2. FUNDAMENTAL LEGAL-ECONOMIC PROCESSES: THE LEGAL-ECONOMIC NEXUS

This section examines the basic models used in my approach to the economic role of government. These models are then used in several paradigmatic case studies, after which I again identify the principal points I am trying to make. The sequence of models has varied over time.

2.1 First Model: The Problem of Order

The Problem of Order requires that the student temporarily, for analytical purposes, suspend belief in certain of his or her own deeply held notions or beliefs. The problem of order posits and deconstructs the fact of the continuing resolution in society of the conflicts between freedom (or autonomy) and control, between continuity and change, and between equality and hierarchy. The problem of order is not resolved for mankind; it must be worked out, in a continuing manner, by mankind. Comprehending the foregoing elements of the model of the problem of order is complicated by the fact that each term can be defined and applied differently: freedom, control, continuity, change, equality and hierarchy are all subject to selective perception, in part, perhaps in large part, influenced by how they are worked out in the society in which we live. Each conflict is complex and subtle, as each term is given selective meaning and application. Among the further points that I make are (1) the economy is a structure of freedom and control; (2) change can be most fundamentally change in the structure of power (freedom and control); (3) continuity can mean continuity of the established model of change, rather than continuity of specific arrangements; (4) law is both a mode of continuity (conservation) and a mode of change, that latter comprising the legal change of law (change of law by law, or adopting L^2 to replace L^1);

(5) the necessary comparison of libertarian with order conservatism, and of economic with social conservatism, illustrating the possibility for selective perception and selective application with regard to social control as for or against individual freedom of choice vis-à-vis some concept of right or just behavior or structure.

2.2 Second Model: Market Plus Framework

In the Market Plus Framework approach the market is seen as operation within a framework of legal and nonlegal social control. One problem-whose resolution is an object of the concept of the legal-economic nexus-is that of the separateness of market and framework. In any event, the market is comprehended as in part the product of legal and moral social control, i.e., as an institution that is a function of other institutions which both structure and operate through the market. A larger model, centering on the fuller explication of the social construction of the market, would incorporate Coase's and Means's theories of the firm, for example, yielding a more complex model of interaction.

The nonlegal social controls include morals, religion, custom and education; the terms "nonlegal" and "morals" are used to include all four. Legal social controls involve a variety of sources of law; the terms "law" and "rights" are used to represent legal social control in its entirety. The problems to be worked out include the substantive content of law and of morals; the relative weight of legal and nonlegal social controls; and whether and in what respects and how the framework is static or dynamic, (i.e. legal change of law and nonlegal change of morals, etc.). A problem that is both conceptually and practically difficult is that of distinguishing between "framework filling" and other, nonframework filling, or "particularistic interventions" actions by government. Unless agreement can be achieved over changes in property law and over the role of antitrust law, the distinction between framework and non framework filling actions is incoherent and useless except, potentially, for purposes of argument and of ideology, but always selectively.

2.3 Third Model: Value Diagram

Using a conventional production-possibility curve and social welfare function (and their tangency), I illustrate the simultaneous determination-the working out-of four sets of variables: the values on the axes (the potential agenda items on which choice is exercised), the shape of the production possibility curve (e.g., what is done to influence how much can be produced and, giving effect to whose interests are protected as rights by the law, their cost), the preferences and their weighting by power structure to form the actual social welfare function hypothetically being formed here.

The emphasis is on the actual social welfare function, distinguished from some theoretically assumed social welfare function. The main point is that lobbying, litigation, propaganda, and so on attempt to influence the values on the agenda, the shape of the production possibility curve, people's preferences for the two values on the axes, and the power structure used in weighting preferences. Thus the working out of the simultaneous determination of four sets of variable is shown, illustrating general interdependence, or cumulative causation. Herein also resides the joint determination processes of individual utility maximization and of restructuring whose interests count through changes in law and therefore in rights.

2.4 Fourth Model: Opportunity Set Model of Inter-agent Relationships

Here we have two circles, each representing the opportunity set at a point in time of two actors (or one actor and the sum of all other actors). The scope or size of an individual's opportunity set is a function of their power, here their legal rights; the choices made by an individual from within their extant opportunity set; and the impact of choices made by other individuals and/or by government. Arrows are drawn between the two opportunity sets indicating the making of choices by some Alpha and their impact on the opportunity set of some Beta, when they are in the same field of action. Included in their respective opportunity sets is the right to petition (through litigation and/or lobbying) government to change the law in their interests. By power is meant participation in decision making and/or the bases thereof in law and legal rights. The composition of individual opportunity sets and their respective places in the total structure of opportunity sets are two sides of the same phenomenon. Choice from within an individual's opportunity set is but one of the factors governing opportunity set structure and therefore the distribution of welfare. The individual's opportunity set is both a dependent and an independent variable. This model is another but different way of illustrating general interdependence, or cumulative causation and therefore the joint operation of utility maximization and working out the structure of power (legal rights).

I have found that this is a good point at which to identify and examine, first, certain principles of power, and second, certain dualisms of power. Among the principles of power are:

- i. Power is necessary for desired ends.
- ii. The quest for power is derived partly from the desire for particular ends, partly for "its own sake," i.e., identity reasons.

- iii. The reciprocal character of power: the power of Alpha is checked by the power of Beta, if both are in same field of power.
 - a. The present concern is with zero-sum games. Both positive- and negative-sum games exist. Much of economic life is positive sum, often with cooperation in production a positive sum, and distribution of gains a zero-sum game. Mainstream neoclassical economics is principally concerned with positive-sum games. Politics too is a combination of positive, zero-sum and negative games.
- iv. The tendency is for the powerful to seek further power.
- v. The tendency is for power to provide its own rationalization.
- vi. Pluralism as goal requires a division of power as a check on power in order to diffuse power. Different divisions of power yield different forms etc. of pluralism
 - a. Policies ostensibly to diffuse power can under certain circumstances operate, and be intended to operate, to concentrate power.

Among the dualisms or paradoxes of power are:

- i. Decisions are a function of power structure and power structure is a function of decisions.
- ii. The working rules of law and morals govern the distribution and exercise of power and the distribution and exercise of power govern the development of the working rules.
- iii. Values depend upon the decision making process and the decision making process depends upon values.
- iv. Income and wealth distributions are a function of law and law is a function of income and wealth distributions.

2.5 Fifth Model: Policy as Function of Power, Knowledge and Psychology Variables

This model greatly reflects Vilfredo Pareto's general social equilibrium analysis but is presented in the form of a modern restatement and is also to be found, with various differences in the works of others.

- a. Definitions of terms:
 - i. Power: participation in decision making and the bases thereof, especially legal rights.
 - ii. Knowledge: that which is taken to be a credible definition of reality and thereby a credible basis of policy; may or may not constitute "hard" knowledge; also our definition of values.
 - iii. Psychology: psychic state and/or structure.

- b. Three sets of variables
 - i. Interaction within each
 - ii. Interaction between the three
 - a. General interdependence
 - b. Cumulative causation
 - c. Joint determination
- c. Each is subject to variable structuring and interpretation.
- d. Propositions made in terms of one of the three typically can be restated in terms of another(s).
- e. Any phenomenon can be interpreted in terms of one or another of the three.
 - i. Profound interpretive problem: relative explanatory importance in particular cases.
- f. Pareto's own broadest model, stated in modern terms: See Warren J. Samuels, *Pareto on Policy* (Elsevier 1974).
- g. Ubiquitous aspects and elements of normative choice.
- h. Selective perception of power, freedom, coercion, government.
 - i. Herbert Simon, *Reason in Human Affairs*, 1983: "In our society, we have an unfortunate habit of labeling our political institutions in two different ways. On the days when we are happy with them, we call them democracy; on the days when we are unhappy with them we call them politics. We don't choose to recognize that 'politics,' used in that pejorative way, is simply a label for some of the characteristics of our democratic political institutions that we happen not to fancy. Neither 'politics' nor 'democracy' wholly describes those institutions, and we solve no problems by labeling their wanted and unwanted aspects in this particular way" (p. 99). He is wrong at the end: labeling does channel problem solutions, selectively. He is correct, however, in his subsequent identification of those participating in the political process as 'politicians' even though "For them, 'politician' was simply a cussword, a term they couldn't imagine applying to themselves. . . . we must recognize that certain kinds of political phenomena--the attempt to influence legislation or the administration of laws, the advocacy of special interest--are essential to the operation of political institutions in a society where there is, in fact, great diversity of interest, and where

most people are expected to pay some attention to their own private interests” (p. 100).

- Problem of the role of the expert: political.
- Problem of technical versus subjective solutions.
- ii. Oliver Wendell Holmes to Harold J. Laski, April 5, 1917: “... what we call the interest of the public is little more than a phrase. We invoke it against labor in a situation like that in the threatened railroad strike but when the roads ask for a 15% increase in rates we are singularly quiet about it.” (*Holmes-Laski Letters*, Mark DeWolfe Howe, ed., Cambridge, MA: Harvard University Press, 1953, p. 76)
 - Normative judgment always required.
 - The problem is to recognize that it is involved—versus absolutist legitimization.
- i. Knowledge: has to do with our definition of reality and of values
 - i. Definition of the problem: what one expects, defines as possible, desirable.
 - ii. The scope and ordering of variables
 - iii. That which is accepted as given
 - iv. The tautological character of reasoning
 - v. The choice of alternative models and paradigms
 - vi. Reliance on myths, symbols, metaphors, ideology:
 - a. Generalized, a priori, efficient ready-made solutions
 - i. generally still subject to selective perception
 - vii. Heterogeneous character of knowledge at any point in time
 - a. Problem of choice of knowledge per se, as basis of policy choice
 - b. Policy or problem solutions tend to be tautological with definition of problem
 - c. What people believe is often more important than what they should believe; it is the former which they act upon
 - viii. Reality of manipulation of information flows-what politics is in part about: manipulation of political psychology by manipulation of information
- j. Psychology:

- i. Horney: complex postures consisting of withdrawal, aggression, compliance; alternatively, grandiose or constrained view of self
 - ii. Freud:
 - a. Posture as to frustration and authority, and therefore as to continuity and change, freedom and control, hierarchy and equality: through resolution of Oedipal and adolescent conflicts
 - b. Each individual a blend of complex psychic states and motivations: capable of being selectively reinforced and weakened; exposed to multiplicity of competing pressures
 - iii. Personal identities and attachments with psychic meaning, thus specific content regarding freedom and control, etc.: subject to manipulation through contrived or selective identification as freedom or control
- k. Power: (in addition to supra)
- a. Power and public finance
 - i. Structure of power and distributions of income and wealth as focus
 - a. Conflicts over these are at the heart of public finance: “shifting taxing from me to thee, and spending from thee to me”
 - ii. Examples of recognition in public finance literature: (sources from *Land Economics*, vol. 48 (August 1972), pp. 256, 262)
 - a. John Maurice Clark: government becoming “more frankly a vehicle through which groups may directly promote their particular economic interests”
 - b. Gustav Schmoller: “The higher economic classes have always understood more or less how to develop customs and laws in their favor, how thereby to increase their incomes and their property, how to give themselves an advantage in commercial intercourse. The middle classes have to a certain extent attempted the same thing, as opposed to the upper classes. Their success has been variable. The lower classes have always been most unfavorably situated for that sort of influence ...”

- c. Arthur Cecil Pigou: “Adam Smith’s invisible hand is not an external fate taking precedence over political institutions, but does its job, well or ill, only because these institutions have been framed, maybe in the interests of a ruling class or clique, maybe for the general good, to control and direct its movements.”
 - d. Rudolf Goldscheid: “The rising bourgeois classes wanted a poor State, a State depending for its revenue on their good graces, because these classes knew their own power to depend upon what the State did or did not have money for ... [This] leads to something like a State within the State and this becomes the real State in the place of that which is declared as such by the formal legal order and its sham moral trimmings. ... The State became the instrument of the ruling classes by the fiscal organization which they imposed upon it. Capitalists have used the public household on the largest scale to enhance their profits and extend their power since capitalism has emerged triumphant in the form of finance capital.”
 - e. Joseph A. Schumpeter: “The kind and level of taxes are determined by the social structure, but once taxes exist they become a handle, as it were, which social powers can grip in order to change this structure.” “... it is, however, decisive for a realistic understanding of the phenomenon [sic] of the state to recognize the importance of that group of persons in whom it assumes social form, and of those factors which gain domination over it. This explains the state’s real power and the way in which it is used and developed.”
- iii. Samuelson, *Newsweek*, January 7, 1974, p. 58
 - a. Politics is economics carried on by other means
 - b. Economics is also politics carried on by other means

iv. Economic role of government as aspect of problem of order

The following preliminary paradigmatic case studies have these functions: to apply the foregoing models and to extend and strengthen our insights and knowledge regarding the economic role of government.

2.6 First Preliminary Paradigmatic Case Study

1. Upstream steel plant, downstream shrimp plant, further downstream flower grower.
2. Dual nature of rights and reciprocal character of externalities: realized externality as a function of rights.
 - a. Rights determination does not generate costs, only their distribution.
3. Shrimp plant as recipient of externalities (waste from steel plant: negative externality) and as generator of externalities (waste from shrimp plant a positive externality (enriched water) for flower grower).
 - a. If add public beach further downstream, can envision all three upstream producers generating negative externalities).
4. Regulation determining rights and externalities contrasted with government clean-up.
 - a. Government does not generate costs, only their distribution: one party or another, or taxpayer-supplied general funds
 - b. "Inflation" argument fallacious: costs newly borne by polluters lowers costs of hitherto polluters.
5. Fundamental conceptions:
 - a. Dual nature of rights
 - b. Reciprocal nature of externalities
 - c. Status quo point
 - i. Ambiguous and heterogeneous character of status quo
 - ii. Selective perception
 - iii. Status quo point and realized externality
 - d. Complex valorization-registration in market
 - i. Critique of idea that externalities are costs (benefits) not internalized in market
 - e. Non-unique Pareto optimal results

2.7 Second Paradigmatic Case Study: Pregnancy Leaves

This case illustrates the several different modes of generating rights: (1) private contract, company policy, collective bargaining; (2) legislation mandating coverage; (3) equal protection clause (for mother, or for father, or both).

2.8 Third Paradigmatic Case Study: Red Cedar Case, 1928

- a. Summary of case
- b. Aspects:
 - i. Inexorable necessity of choice faced by legislature
 - ii. Technological solution-and possible further externality and rights problems
 - iii. Large versus small numbers and organizational costs: regarding right to redress grievances to legislature and/or courts
 - iv. Structure of mutual coercion
 - a. Non-unique Pareto optimality
 - i. Different power structures lead to different resources and efficient results
 - ii. Noncomparable
 - v. Meanings of “intervention”
 - a. Intrusion of government into situation in which it hitherto had been absent
 - b. Legal change of legal rights, thus of the interests to which government lends its support
 - vi. Conflicts of philosophies of “property”

2.9 The Legal-Economic Nexus

This concept, proposed as fundamental but difficult to articulate using conventional terminology, portrays political-governmental-legal and economic-market processes as not fully separate, self-subsistent orders, but rather as constituting twin aspects of a fundamental legal-economic nexus in which polity and economy are mutually defining and which arise out of a common process.

2.10 Some Fundamental Points

These points are intended to reiterate, perhaps restate from a different angle, and to extend the foregoing discussions, as well as to provide a summary of the foregoing discussion.

1. Law as part of social (re)construction of economy
2. Economics as part of social (re)construction of economy and of law
3.
 - a. Platonic element: derivation of ideal as basis and target of policy
 - b. Aristotelian element: what is fundamental independent of selective perception, subjectivity, and normativism
4. Paradoxical intertemporal characteristics of law and legal process:
 - a. Ex post nature of common and constitutional law
 - b. Precedential mode of discourse
 - c. Futurist nature of law: governs rights and relationships in future
 - d. Public good nature of law, e.g., court decisions: non-excludability and zero marginal cost of additional members of group
5. Critical importance of status quo point: dual nature of rights, reciprocal character of externalities: governs whose interests are to count and distribution of benefits and sacrifice, e.g., realized externalities
6. Critical role of selective perception, e.g., selective identification of actual or hypothetical status quo
7. Dual meaning of intervention: intrusion into situation in which government has hitherto been absent, versus legal change of interests to which government effectively gives its support
8. "Government" as legal change
9. Fundamental importance of government in status quo: George Will column, 2 March 1981:

Reagan:

"The taxing power of government must . . . not be used to regulate the economy or bring about social change."

Will:

"Oh? The choice of any tax program is a choice from a large universe of alternatives. Any tax program has special social consequences; it raises some revenues rather than others, encourages and discourages particular behavior. And rarely has there been a clearer, bolder, more self-conscious attempt than Reagan's to use the tax system as a lever for moving society in the direction of desired change. But American conservatives are addicted to the pose of hostility to government power, so they systematically misdescribe their own attempts to use government energetically.

When, Oh Lord, shall we be delivered from the conservatives' pretense that they, unlike liberals, do not believe in using government to promote their values through social change? If that were true, there would be no point in electing conservatives."

10. Economy is an object of legal control and law is an instrument of economic gain-advantage (law as an economic alternative and as object of control and use).
 - a. Law as social control and as power player
 - b. Law as control and as object of control
11. Principle of the use of government: an instrument available to whomever can control it
12. Government:
 - a. Diverse Approaches:
 - i. Government as an exogenous black box (perfect; nondecisional): 'slot machine theory of justice'
 - ii. Government as a neutral extension or aggregation of private choice
 - iii. Government as nonneutral decision-making or preference-aggregating process
 - iv. Government as an instrument of the powerful, e.g., ruling class
 - v. Government as an instrument with which to check the power of the powerful
 - a. Whether government is to be used to reinforce power of the already powerful, or on behalf of the powerless to check the power of the powerful, the powerful and the powerless owe their respective existing positions in part to other, past actions of government
 - vi. Government as the source of problems, if not of evil, in society
 - vii. Government as the source of progress
 - viii. Government as part of the necessary framework of the market
 - ix. Preference aggregation process
 - x. Government functions to serve the 'public interest'
 - xi. Government as a matter of the self-interest of politicians (as distinct from self-interest, or something else, of all citizens)
 - xii. Government a complex decision-making process; not a single entity (no more "the government" than "the market")
 - xiii. Governance as the sum of private and public governments
 - xiv. Government as both dependent and independent, interactive variable
 - b. Complex Personal Approach
 - i. An arena of power and power play
 - ii. Value clarification process
 - iii. Government as social control or power player, or both simultaneously

- iv. Institution of collective action: mechanism of social welfare function formation and change: mechanism and process
 - v. "Collective bargaining state"
 - vi. Politics as mode of self-government
 - vii. Government as dependent and independent variable
 - viii. Law taking versus law making
 - ix. Determination of economic role of government versus determination of substantive content thereof
 - x. Principle of use of government
 - xi. Central focus on legal change of law
 - xii. Governance: private and public government
13. Government is important in definition, creation and structuring of economy, as such requires normative direction
- a. Most discussion of economic role of government is part of, contribution to, participant in, process of working out necessary normative direction
 - b. Critical role of social belief system
 - c. Centrality of power: power in government, power in economy, the determination of power in each, the mutual interaction, and especially the simultaneous and/or mutual definition of economic and political power
 - d. Critical role of selective perception
 - e. Key empirical problem: legal change of law
 - f. Efforts are continually being made to obfuscate the role of government so as to selectively channel the re-definition and re-creation of the economy
14. Conceptualizations: some "primitive" terms necessarily given substance in practice:
- a. Law, economy, private, public, property, free enterprise, regulate, deregulate, commodity, product definitions, economic units ("individual"), costs (whose interests count as cost to others, through rights)
 - i. More detailed examination later
 - ii. Using any of these terms as found in existential practice (1) begs questions, (2) is often ambiguous, permitting selective perception and application, (3) gives effect to much other relevant law
 - iii. These are not natural, real, or independent of social practice; most are insubstantial symbols created and given episodic, selective meaning in practice
 - b. Diversity of constitutional "readings".

3. ECONOMIC ROLE OF GOVERNMENT / LAW AND ECONOMICS IN THE HISTORY OF ECONOMIC THOUGHT

3.1 Historical Overview

1. Old and fundamental topic
 - a. Can argue that treatment of law, or of law and economics, in history of economics has been channeled by (i) fundamental conception of economy, (ii) preconception with contemporary agenda for government, (iii) efforts, deliberative or otherwise, to protect or change distributions of income, wealth and opportunity, as well as control of government
 - b. Critical to society
 - i. Basis and/or target of ideologies
 - ii. Considerable literature prior to last thirty years: legal writers, economists
 - c. Overview is highly abbreviated; intended to give flavor, not provide comprehensive treatment
2. Locke, Physiocrats, English Classical Economists
 - a. Conflicting interpretations, e.g., English Classical Economists
 - b. Each had greater economic role for government than commonly recognized: Due to (1) ignorance, (2) taking certain things for granted and not considering them governmental in character, (3) promulgation and effect of dominant ideology
3. Considerable literature on relationships between legal and market-economic processes during century prior to 1960 (date of publication of Coase's classic article)
 - a. A central focus of institutional economics: Henry Carter Adams's *Economics and Jurisprudence*, Richard T. Ely's *Property and Contract in their Relation to the Distribution of Wealth*, Commons's *Legal Foundations of Capitalism*, John Maurice Clark's *Social Control of Business*
 - b. Multiplicity of articles by economists and by lawyers (legal realism, e.g. Walton Hamilton); very rich analyses
 - i. Approaches:
 - a. Economy as a function of law
 - b. Law as a function of economy
 - c. Nexus with interrelations
 - d. Market plus framework
4. Within the neoclassical mainstream:
 - a. Pigovian: reformist; requires assumption re whose interests are to count, in determining which/whose externality is to be realized, and thus distribution of sacrifice

- b. Paretian: antireformist; requires assumption pro status quo rights and consequences thereof
- 5. Marxian
 - a. State as instrument of domination and exploitation in class society
 - i. Role of private property
 - ii. Instrument of rule, making law in interest of the powerful
 - iii. A class instrument, with direct and indirect control of government
 - iv. Level and structure of government budgets determined by “who rules” and by conflicts within and between classes and groups
 - b. Functions:
 - i. Legitimization and reproduction of system and of power structure
 - ii. Abet private capital accumulation
 - c. Conflict between
 - i. Legitimization needs of system, through welfare state, even if token, and
 - ii. Facilitation of accumulation
 - d. Internal, inherent conflicts within capitalism generate spending for military, education and welfare, with regard to:
 - i. Legitimation of system and reproduction of social relations (class structure)
 - ii. Imperialism
 - iii. Buying off poor and avoiding revolution
 - iv. Countering economic instability
 - v. Conflicts within capitalist class over distribution of surplus value
 - vi. Conflicts between capital and labor re generation of surplus value
 - vii. Increasing socialization of private costs of business, e.g., pollution clean-up
 - e. Growth of public spending due to (1) growing concentration of capitalist power and its use of the state, and (2) growth of crises and conflicts within capitalism (economic instability and labor-capital conflicts), with spending growth a reflection of conflict and functioning to dampen class conflict, e.g., welfare state
 - f. More recent Marxian work deemphasizes class control and sees state as power center, more or less autonomous, functioning to reinforce dominant interests by virtue of its role to promote viability and stability of system, a field of power balance of and conflict resolution within the system

6. New developments, last thirty years or so
 - a. Neoclassical-Chicago
 - i. Search for “optimal” law, rights, problem solutions
 - ii. Interpretation of legal history and operation of legal system per market analogs, e.g., transaction costs
 - a. Ronald Coase
 - iii. Law as maximization of value of output (wealth)
 - a. Richard Posner
 - b. Institutionalism
 - i. Description and interpretation of how legal system works out fundamental problems
 - ii. Problem solving strategies
 - iii. Given diagnosis of dominant corporate system: planning or return to market?
 - c. Marxism
 - i. State as autonomous rather than deliberative
 - ii. Success of dominant ideology and of repression accounts for increasing conservatism of population
 - d. Critical legal studies movement
 - i. Combination of legal realism and Marxism in law, but also more than that
 - a. Viet Nam and civil rights era radicalism extended
7. Some key, albeit controversial, points:
 - a. Basic economic institutions function law
 - b. Principle of use of government (political capitalism)
 - c. Dual nature of rights + reciprocal nature of externalities, imply (a) ubiquitous and inevitable externalities, (b) necessity of choice, (c) ambivalent attitudes toward government
8. Law school:
 - a. Trade school, for many: learning a profession
 - b. Intellectual journey re critical role of law and of government in regard to the economy
 - c. “Training in ‘socialism’”-by some definitions of socialism

4. OF LAW AND RIGHTS

- A. Law as Language
 1. Concepts embodied in words, selectively defined and selectively applied: e.g., “property”
 2. Used in the process of defining and (re)making economy and society, as if words had independent meaning which we were trying to achieve

3. Legal system and economy are artifacts, influencing and yet influenced by concepts ensconced in words
 4. Fallacy of misplaced concreteness: reification
 - a. Determinism and foreclosure of process
 5. Multiple possible readings of texts
- B. Constitutional and Legal Juxtapositions and Conflicts
1. Diversity of constitutional readings
 - a. Conflicts of constitutional clauses, e.g., commerce clause vs 5th and 14th Amendments
 2. Diversity of readings of common law precedential sequences
 - a. A matter of where one is going to draw the line, or the selective application of one legal principle of clause rather than another
 3. Texts combined with varying valuational paradigms regarding how economy and society should be organized and operated
 4. Sometimes a matter of defining rights as if they existed independent of government and limiting law (in which case law “takes” rather than “makes” law), or as inclusive of such law
 - a. Will discuss taking issue and compensation problem later
 - b. Eminent domain versus police power (“petty larceny” of the police power; compare Epstein)
 5. Some “primitive” terms necessarily given substance in practice by law:
 - a. Law, economy, private, public, property, free enterprise, regulate, deregulate, commodity/product definitions, economic units, costs (whose interests count as cost to others)
- C. Complex Intertemporal Characteristics of Law
1. Futurist nature of law: governs rights and relations in future
 2. Ex post nature of common and constitutional law
 - a. Belief in/pretense of “discovering” “pre-existing” law
 3. Public good nature of law, e.g., court decisions re compass of adjudicated rights
 4. Constitutional and legal juxtapositions and conflicts:
 - a. District Court judge imprisoning a lawyer for contempt of court; absolute authority or check via habeas corpus to another court
 - b. British Official Secrets Act re national security, versus perceived necessities of a free society and protection from government malfeasance and corruption
 - c. U.S. Constitution: constitutional juxtapositions: delegated powers versus limitations in amendments (and in original document)

- i. Diversity of constitutional readings
 - ii. Same regarding common law precedential sequences: necessity and fact of choice
 - a. A matter of where one is going to draw the line, or the selective application of one legal principle or clause rather than another
 - b. E.g., a matter of defining rights independent of governing and limiting law (in which case law 'takes'), or as inclusive of such law
 - i. E.g., eminent domain versus police power ('petty larceny' of the police power; compare Epstein)
 - a. Define police power, eminent domain
 - b. *Mugler vs Kansas*, state can regulate without paying compensation (*Holmes-Laski*, p. 473)
- d. Proposed ordinance requiring two people on duty in all-night groceries, to deter robberies: effectiveness issue (30% reduction in one case); another issue: said to conflict with "free enterprise"
- e. Aforementioned problem of pregnancy leaves: modes of generating rights: private contract, legislation, equal protection clause [for mother, or for father, or both]
- f. Running a university, or a business: what is governed by employment contract, by practice of managerial hierarchy, by law (statute, court decisions); what can be changed unilaterally, what by majority vote: re faculty, students
 - i. English case, *Poplar*, House of Lords sustained determination of a District Auditor that wages of municipal employees should be reduced as the cost of living declined; c. 1925 (*Holmes-Laski*, p. 808)
 - a. what does employment contract explicitly call for?
 - b. In what legal context is it interpreted?
 - ii. Standardized contracts 'of adhesion'
- g. Concept of "sovereignty"
 - i. Applicable to polity and economy; can take a sociological view as well as legal: property as sovereignty
 - ii. Problem of governmental liability: *Kawananakoa v. Polyblank*, 1907: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that

there can be no legal right as against the authority that makes the law on which the right depends.”

- iii. Issues:
 - a. Liability per se
 - b. Given legislature can establish liability, can court impose it?: legislature vs judiciary in law making
 - c. Desirability versus a matter of logical necessity (e.g., that the source of law should be subject to the law that it makes, unless it chooses to say that it will be: Holmes)
 - d. Any difference whether sovereign is king or people?
 - i. Argument that the English king in the 13th century both sued and was sued as a private person, and that non-suability was mainly a Tudor-Stuart doctrine very largely due to influence of Renaissance theories of sovereignty (and, arguably, desire to avoid liability)
 - e. Whether sovereignty is anything more than a balance of forces, a matter of policy and power and how far the strongest will stand the others
 - i. “every ultimate repository of ultimate political power de facto has limits beyond which it cannot go because the people would fight . . . the ultimate source of law when you find it, is subject to such laws or resolutions only as it chooses to impose upon itself, from a legal point of view, and that therefore the State is not subject to legal claims except so far as it sees fit to submit itself to them” - Holmes (Holmes-Laski, p. 183)
 - ii. Comments:
 - a. Much metaphysics here
 - b. Practical matter in face of rebellion or threat thereof
 - i. Did English Parliament have the right to legislate for the American colonies? the power? (Holmes-Laski, p. 616)
 - c. Government a process of working this out

- d. Residue of medieval monarchical government
- e. Universal “tort” liability of government
- f. Government as mode of determining its scope, function, and liability—though in larger context
- f. Are courts part of government in respect to the legislature as ‘sovereign’?: Holmes:

“ . . . as to sovereignty, because as I understand the question it seems to me one that does not admit of argument. The thing to which I refer has nothing to do with the difficulty of finding out who the sovereign is, or the tacitly recognized de facto limits on the power of the most absolute sovereign that ever was. The issue is on the decision that you criticize, and even narrower than that. If you should say that the Courts ought in these days to assume a consent of the U.S. to be sued, or to be liable in tort on the same principle as those governing private persons, I should have my reason for thinking you wrong, but should not care, as that would be an intelligible point of difference. But what I can’t understand is the suggestion that the United States is bound by law even though it does not assent. What I mean by law in this connection is that which is or should be enforced by the Courts and I can’t understand how anyone should think that an instrumentality established by the United States to carry out its will, and that it can depose upon a failure to do so, should undertake to enforce something that ex hypothesi is against its will. It seems to me like shaking one’s fist at the sky, when the sky furnishes the energy that enables one to raise the fist. There is a tendency to think of judges as if they were independent mouthpieces of the infinite, and not simply directors of a force that comes from the source that gives them their authority.” (Holmes-Laski, p. 822)

- i. This is of course the very point at issue: who declares law as an exercise of sovereignty? Yet, Holmes is best known for his statement that the law is not a brooding omnipresence in the sky (Holmes-Laski, pp. 776, 6n4, 190, 380, 68, 74, 183, 822, 896, 940).
- g. ‘Sovereignty’ as metaphor—but for what?
- h. Student newspaper case (reporting on consequences of pregnancy and divorce): facets, or decisional or interpretative handles:

- i. Privacy
 - ii. Educational policy
 - iii. Property right of school authorities
 - iv. Election control of school authorities
 - v. Behavioral consequences for student journalists
 - vi. Free speech
 - i. Class location: instructor unilateral change of location regarding (1) differential situs and proximity, (2) air conditioning
 - j. *Green v. Frazier* 1920, sustained as constitutional North Carolina taxing statutes designed to make possible the financing of public control of the manufacturing and marketing of farm products (Holmes-Laski, p. 263n3)
- D. Law. The foregoing discussion has used the concept of “law” as a primitive term. I now examine the various meanings of law with a view toward what law is, what law does, and what is readily obfuscated by unexamined or non-deconstructed uses of the term. I commence with restating the ubiquity of law and examining the nature, differences between, and commonalities of common and civil law systems. The array of common (court) law, constitutional (court), statutory and administrative law is then rehearsed. Given these different sources or forms of law, I then discuss the topics necessarily examined in order to further and more deeply deconstruct the meaning of “law.”
 - 1. Divine, natural, and positive law
 - a. Law as something given, antecedent, preeminent to man
 - b. Law as a creation of human decision making processes, with varying forms and structures of participation
 - c. The misleading conventional view that the legislature makes, the executive enforces, and the judiciary interprets “the law”
 - i. Equally misleading, though conflicting, is the conventional view that law is found, not made
 - d. Law as process, rather than a “fact:” a system and not a working-back to some a priori system of rights, or something to which state must seek to conform; rather, something to be worked out
 - e. The inevitability of the normative nature of law; a political (having to do with power and choice) phenomenon
 - i. Contrast with pretense of given law, as if in the same class with solar system: function of:

- a. Legitimization: to coerce acceptance, in part through reification
 - b. Psychic balm: widespread longing for a natural, depoliticized existence
 - ii. Two conceptions of “politicize:”
 - a. Putting something into politics which was not hitherto in politics
 - b. Making explicit as politics what was political all along
 - c. Parallels dual view of relation of property and other rights to police power:
 - i. Police power as external to rights—implies intrusion
 - ii. Police power as integral to rights per se—does not imply intrusion
 - f. Naturalistic fallacy: treating what “is” as if it were real, natural in some absolute ontological sense; telescoping “is” and “ought”
- 2. Rights
 - a. As claims
 - b. As adjudicated conflicts who can do what to whom
 - c. As supportive/protective legal sanctions
- 3. Regarding common, court law: what is the “law”?
 - a. The decisions
 - b. The ratio decidendi of case: the ground of a decision, the basis of the holding
 - c. The precedential sequence, somehow interpreted
 - d. The overriding principle of rule of which the former are evidence of manifestations
 - e. The overarching rule or principle of which the former are manifestations or evidence
 - f. The natural law
- 4. Another approach: the law on paper/in action/prosecutorial, judicial and enforcement discretion
- 5. The sources of law: (in part a function of definition of law)
 - a. Custom
 - i. Problem of co-existing bodies of custom; necessity of choice
 - ii. Problem of custom as a function of the law vis-à-vis law as a function of custom
 - b. Morality and equity
 - c. Public policy
 - d. Statutes

- e. Force (will of the sovereign, with sovereignty ultimately a matter of force)
 - f. Past judicial precedents (judicial authority)
 - g. Opinions of experts (academic etc. authority)
 - h. Legal theory (analytical jurisprudence): logic
 - i. Nature of models and of logic
 - a. Nature of models, in relation to conclusions
 - b. Logic and truth: Euclidian axiom
 - ii. Can one expect answers from logic alone?:
 - a. Which/whose premises
 - b. Holmes: law is logic and life, especially latter
 - iii. Can one base economic role of government on narrow theoretical limits pertaining to a static existence?
 - a. Why not, is done all the time; point is to recognize it
6. Sociological jurisprudence/legal realism: emphasis on experience and practice: legal equivalent of Institutional Economics
- a. Basic argument: arises within and on basis of experience
 - b. Experience requires norm- and theory-laden basis on which to be perceived
 - c. Problem of which/whose experience, premises, goals, future: a matter of power and policy
 - d. Problem of whether the law is an expression of a certain set of economic conditions
 - i. Yes: industrial capitalism
 - ii. No: which/whose interests are sacrificed to who else's: have choice even within system or conditions
 - e. Tendency to make historical accounts produce categories and then use the categories as an explanation of the history; reification per absolutist legitimization, predisposition to determinism
 - f. Reality or premise of study: exercise of choice per se (legal realism, critical legal studies, institutionalist approach to law and economics)
 - i. Mainstream foci on:
 - a. Determinate policy solutions
 - b. Policy solutions deemed aprior optimal (efficient)
 - c. In both respects, obfuscating, and giving effect, to necessary premises re whose interests are to count, as rights
7. Theories of law, and of law and economics, become/are part of process of working out substantive problems of law-legal policy

- a. Treating constitutional text, or concept of property, as given or absolute, gives effect not to constitution but to interpretation given privileged status
- b. Law is social control, and arena for conflict over privileged status to be given to interests; to identification, definition and application of rights; and to interpretation of language (common law and constitutional doctrines)
- 8. Law: as check on power, or as instrument of power: both
 - a. Law as persuasion re social control effects
 - b. Law as symbol manipulation
 - i. McCloskey: economics, too: market etc. as metaphor
- 9. Law/policy distinction evaporates
 - a. Pretense of law as given; policy as matter of choice; pretense of law as found, not made
 - b. Contexts:
 - i. Philosophical: law as policy matter: versus philosophical realism, scientific realism (applicable to law?)
 - a. Telescoping 'is' and 'ought'
 - b. Idealism versus realism, and inexorable necessity of choice
 - ii. Practical: division of power between legislature-executive and courts; social control role: absolutist legitimization; psychic balm of powerful: deny power
 - iii. Controversy whether judges make or declare (find) law may be literally a waste of time, though controversy itself is facet of continuity versus change and power-structure controversies in society (Holmes-Laski, p. 590)
- 10. Law as choice/reasoning
 - a. Behind every body of law is an implicit body of metaphysical (normative) conceptualization re philosophy of law, society, interests -- usually economic system - or ideology-specific, e.g., transformation of common law from agrarian to urban business society
 - b. "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." "But although practical men generally prefer to have their premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end." Holmes (Holmes-Laski, p. 238n.7)

- i. St. Thomas Aquinas: when reason comes to particular cases, reason needs not only general but particular principles

E. Rights

1. Rights in General

- a. Claim, affirmation of claim, means of protection and enforcement
- b. 'Rights' as mode of discourse: argument in terms of rights claims, typically when claim is point at issue
 - i. Multiple models
- c. Rights in Hohfeldian system
- d. Rights in Hale-Samuels opportunity-set mutual-coercion model: rights as basis of power
- e. Rights as check on power, or as instrument of power
- f. Statement that "X has right to":
 - i. By court, it is an 'is' statement but represents an 'ought' re structure of decision making participation
 - a. Pretense of given law to be discovered
 - b. Telescopes is and ought
 - i. "That is not the law of England." "I am perfectly aware of it, but I am considering whether it should be the law of Massachusetts." (Holmes-Laski, p. 692)
 - ii. "It is the law." "I agree, and I am arguing that it ought not to be the law." "I assume that the House of Lords must be right." (Holmes-Laski, p. 775)
 - ii. By participant, an 'is' statement
 - iii. Judging law by its intent (whose), its effects (multiple), or by its consonance with something absolute (whose interpretation/specification)
 - iv. Consistency problem: impossible in problem-of-order context and re multiple principles
- g. Significance of rights in context of other rights: relative, limited
- h. De jure versus de facto rights
- i. Paradox:
 - i. Rights as given, anterior to policy, and govern economic outcomes (minimized by Chicago orthodoxy)
 - a. Given by nature, by constitution?
 - ii. Use economic analysis to determine rights (Posner version of Chicago)

- j. Aspects of property rights in economic analysis
- 2. Property rights
 - a. Objectives of discussion
 - i. Discuss the nature of property rights with a view to their use in economic analysis and the dispositiveness of issues by economic analysis
 - ii. Discuss specific role of property rights in economic analysis
 - iii. Deal with controversial fundamentals, hopefully in constructive manner, hopefully useful to audience likely to be more sophisticated about these matters than most economists
 - b. Nature of (Private) Property Rights
 - i. Property as power, meaning established participation in decision making, and bases of such participation
 - a. Rights as claims/protected interests/mode of protection
 - ii. Relative versus absolute nature of property
 - a. Bundle of rights
 - i. Relative to other rights, to governmental determination and limitations
 - b. Private versus public character of property rights and indeed all rights
 - c. Contingent, problematic economic significance of property rights
 - d. Transformation of nature and distribution of property rights
 - i. Smith: transformation from feudal to commercial property systems: economic stages, with property, government and law specific to each stage
 - ii. Horwitz, Nelson and others: transformation of American law in 19th century
 - iii. Conflict and dynamics of property
 - a. Conflicts among property rights
 - b. Conflict between property rights and competition
 - c. Dynamics: Schumpeterian creative destruction
 - i. Endogenous process
 - ii. Inevitability of noncompensated losses: impossibility of Lockean

- approach (government exists to protect private property rights)
 - a. Reciprocal externalities
 - d. Conflicts between property rights and other rights (property right equivalents)
- iv. Institution of property vis-à-vis particular details of property rights as to whose interests are so protected within general institution
- v. Co-evolution of property and government
- e. Property as whatever interests are protected as property: property is what is protected, not protected because it is property
 - i. Government always employed in aid of some interest; problem as to which/whose interest, not 'no interest'
 - ii. 'Nightwatchman' theory of government highlights question of determination of what he is to watch over, i.e., determination of property rights—which the theory obscures and thereby functions to reinforce status quo set of entitlements (wealth distribution), ignoring unequal use of government to determine and assign property rights
- f. Property as part of larger “problem of order” in society: ongoing conflict and resolution of freedom versus control, continuity versus change, hierarchy versus equality
 - i. Positive versus normative theories of property: selectively functional in ongoing conflicts
- c. Property rights and the conduct and conclusions of economic analysis
 - i. Circularity/tautology re: private property rights and optimality (“private property is necessary to yield optimal outcomes”): optimality defined as individual adjustment via self-choice (or self-interest pursuit) enabled by private property
 - ii. No unique optimal solution:
 - a. Entitlement-specific Pareto-optimal outcomes
 - b. Resource allocation a function of power structure (property-rights definition and distribution)

- i. Resource allocation a function of market (demand and supply), which is in turn a function of power (rights) structure, government (re)determination of rights, control of government, contest over control of government
 - iii. Ineluctable problem of which/whose interests are to count: inevitable distributional, or structural, problem
 - a. If individual preferences are to count, which individuals and through what institutional-power structure: inevitable problems
 - i. Status quo rights structure or some hypothesized one must be used
 - iv. Government and property as interdependent variables and as both dependent and independent variables
 - v. Role of selective perception of recognized losses and modes of loss, of what is “property”
- F. Some Principal Points or Conclusions
 - 1. Fundamental economic role of government in economic affairs
 - a. Especially regarding legal rights or their equivalent, governing whose interests count
 - 2. Obfuscation thereof via ideology, yet functional in working things out
 - 3. Fundamental governmental role even independent of taxing and spending: e.g., re relative rights; which dollars of spending do not measure
 - 4. Laissez faire as government in status quo taken largely for granted
 - 5. Most economic models abstract from government, thus cannot conclusively yield implications re government policy
 - a. Alternatively, models make implicit antecedent assumptions as to whose interests count, which govern policy implications thereof
 - 6. Government as both dependent and independent variable
 - 7. Dual nature of rights
 - 8. Selective perception of law, government, politics, costs, freedom and coercion
 - 9. Critical issue tends to be legal change, not intervention into situation in which hitherto absent
 - a. General and overriding rule is existence of body of law governing all aspects of life
 - b. Conspicuous exception: surrogate parenting

- i. Lesson: immediate commencement of development of body of law governing legality and relative rights
 - 10. Optimality conclusions give selective effect to premises re whose interests are to count
- G. Some Legal-Economic Fundamentals-A Review
 - 1. Problem of order
 - 2. Dual nature of rights
 - 3. Reciprocal character of externalities
 - 4. Status quo point: governs realized externality
 - a. Ambiguous and heterogeneous character of status quo
 - i. Selective perception
 - ii. Selective identification of actual or of assumed status quo
 - b. Meaning of 'intervention'
 - c. 'Government' as legal change: key is control of legal change
 - d. Change within status quo: choice of status quo is choice of a particular mode or mechanism of change
 - e. Selectivity re Alpha-Beta rights conflicts and re reciprocal externalities in definition of status quo: "what one does in assuming a given or hypothetical status quo"
 - 5. Government
 - a. Fundamental importance of government in status quo and, implicitly, in economic models: governs rights and thus whose interests count
 - b. Historical elite control and use of government, coupled with historical effort to defuse others' use of government through negative attitudes toward government
 - c. Resource allocation as function of market demand and supply forces, as function of power structure, as function of rights, as function of government, as function of use of government
 - d. Economy as object of legal control and law as instrument of economic gain-advantage (law as an economic alternative)
 - i. Principle of use of government: an instrument available to whomever can control it
 - e. Government:
 - i. An arena of power and power play
 - ii. Value clarification process
 - iii. Institution of collective action: mechanism of SWF formation and change: mechanism and process
 - iv. "Collective bargaining state"
 - v. Politics as mode of self-government

- vi. A process rather than a completed thing: something 'becoming', rather than 'is' in a final sense
- vii. Most economic models abstract from government, thus cannot conclusively yield implications re government policy
 - a. Selective perception of government, law, and politics; also of freedom and coercion
 - b. Optimality conclusions give selective effect to premises re whose interests are to count
 - i. Implication of dual nature of rights and reciprocal externalities: inevitable noncompensated losses
- viii. As dependent and independent variable
- ix. Taxation and expenditure as handle by which social powers manipulate social structure
- x. Economic role of government / determination of substantive content thereof
- xi. Diversity of legal roles: public production, legal rules, legal rights, legal change of legal rules and rights
- xii. Critical issue tends to be legal change, not intervention into situation in which government has hitherto been absent
- f. Governance: public, or official government not the only institution making decisions having important impacts on individuals and their opportunity sets
 - i. Corporations, trade associations, unions, churches, international agencies, etc.
- 6. The market: 'the market works'
 - a. Yes
 - b. Within, and giving effect to, power structure
 - c. No unique working out
 - d. Government operates within market 'as much as' market operates within law and other institutions
 - e. Normative status of market and of status quo
 - i. Normative-positive treatment
 - ii. Selective perception re:
 - a. Market working
 - b. Change, especially legal change of law
 - f. Joint efficiency- and rights-determination processes:
 - Rights structure R1 leads to optimal solution1
 - Rights structure R2 leads to optimal solution2
 - i. Making and remaking the status quo
 - a. Critical role of legal change as economic alternative

7. Rationality
 - a. Self-interest / self-choice
 - i. Learning of preferences
 - a. Joint determination of (1) objective function (ends) and (2) ends-means relations
 - ii. Assumption of self-interest maximization
 - b. Constrained maximization: maximizing choice within opportunity sets
 - c. Social conditioning and factors governing opportunity set formation
 - d. Law makers / law takers
 - e. Uncertainty
 - f. Deliberative versus nondeliberative character of world
 - i. As positive analysis and as conservative principle of policy
 - ii. Bounded rationality and radical indeterminacy
 - iii. Unanticipated consequences doctrine
 - a. Problem re methodological individualism
 - b. Aggregation aspect due to interdependence: Solo's composite choice
 - g. Creation versus discovery
8. Technical versus subjective solutions:
 - a. Musgrave and Musgrave, *Public Finance in Theory and Practice*, 1973, p. 5: "... the proper size of the public sector is, to a significant degree, a technical rather than an ideological issue."
Burkhead and Minor, *Public Expenditures*, pp. 98-9: "no conclusive principle"
 - b. Problem of role of expert in policy making: problem of distinguishing between means and ends when ends are also means
 - i. Expertise as road to social power
 - a. Expert-power to define problems and solutions
 - c. Examples:
 - i. Technological versus pecuniary externalities
 - ii. Pareto-relevant and Pareto-irrelevant externalities
 - iii. Posner: market for rape, babies
 - iv. Fine versus jail: problem of wealth distribution
 - v. Give rights to transaction-cost minimizing party
 - d. Political decision-making: determinants or modes of legislative voting:
 - i. Ideology
 - ii. Immersion and conclusion-reaching

- iii. Party leadership and rules
 - iv. Vote trading
 - v. Within median voter model
 - vi. Situation similar to Adam Smith on formation of moral rules: seek approval by others and of oneself: tail chasing
 - vii. Absolutist basis itself reveals rival approaches
- e. Joint rights-determination and efficiency-determination processes; also re meaning of 'public interest'
- 9. Theories of government as normative attempts to structure, limit, open, channel use of government
 - a. Interpret and protect or change status quo rights/power structure
 - b. Part of determination of solution to problem of order
 - c. Selective identification of government, freedom, coercion, etc.
 - i. Freedom as nonlegal change?
 - d. Presumptive-optimality reasoning bases
 - e. Inevitable normative task
 - i. Latent or explicit?
 - f. Opportunity set approach
 - i. Non-normative
 - ii. Normative premises, qualitative distinctions necessary to reach decisions
 - g. Government as instrument available for use
 - i. Arena of power play and largesse
 - ii. Including: which internalities, public goods, grants
 - h. Government as both independent and dependent variable
 - i. Government as important part of opportunity set analysis
 - i. Role of government in opportunity set dynamics
 - ii. Heuristic value of opportunity set-mutual coercion analysis re overcoming selective perception of coercion and government
- 10. Law-state-government as social control and as power player
 - a. Fact thereof
 - b. Government as power player
 - c. Integrates, channels, controls, promotes, inhibits
 - d. Independent and dependent variable
 - e. Queries:
 - i. By whom, for whom aim, on which/whose terms
 - ii. Whose use of government

- iii. When is problem that of controlling state, and when that of controlling those who control the state; controller of controllers
 - a. Political apparatus as own motivating system
 - i. 'Independent' life of politics
 - f. Several important conclusions/hypotheses:
 - i. Government is critical both directly and indirectly to economic performance (resource allocation, and income and wealth distribution)
 - a. Government releases, marshals, channels, and perhaps creates (via facilitating status of mutual coercion) of energy
 - ii. Control of government to influence economic performance is important social process
 - iii. One function of ideology is to legitimize status quo or desired power structure; another is to persuade believers that economic performance is (or should be) independent of government, and thereby protect
 - a. Fostering belief in minimization of government while using government, and while perpetuating economic structure a function of past government action
 - iv. Replete with tautologies and hermeneutic circle
 - v. Statism/antistatism is incomplete, false, misleading
 - vi. Key is control of legal change

5. RONALD COASE AND RICHARD POSNER: THE COASE THEOREM AND WEALTH MAXIMIZATION

A. Introduction

- 1. Review of some relevant major themes
 - a. Dual nature of rights
 - b. Reciprocal nature of externalities
 - c. Selective perception, e.g., of rights and of externalities
 - i. Selective perception of realized externalities
 - d. Necessity of normative premises, e.g., re: choosing between rights claimants and who can generate impacts (externalities) on others: whose interests are to count
 - e. Different rights structures produce different externalities, different price structures, different resource allocations, different income distributions
 - f. Intervention as "natural"
 - g. Pigovian versus Paretian welfare economics

2. Some new relevant themes
 - a. Array of externality solutions:
 - i. Education
 - ii. Tax versus subsidy
 - iii. User charges
 - iv. Regulation (standards; prohibition)
 - v. R&D re technology
 - vi. Government production
 - vii. Merger
 - viii. Market for externalities via property rights
 - b. Some general propositions regarding externality generation and solutions
 - i. Externalities are inevitable (given reciprocal character) and ubiquitous
 - ii. Externalities are reciprocal in character
 - iii. Externalities are a function of scarcity plus interdependence
 - iv. Realized externality is function of assignment of rights (status quo point)
 - v. Externality solutions are function of power structure
 - vi. Externality-solutions impose externalities of their own, including restructuring power, costs and benefits, prices, and opportunity sets
 - vii. Fundamental problem of externality policy: which externality, or whose capacity to visit injury on others, i.e., distribution of sacrifice
- B. Coase and the Coase Theorem
 1. Curious situation: Coase affirms that institutions matter, because of non-zero transaction costs; whereas Stigler adopts zero transaction costs to affirm that institutions (initial rights assignments) do not matter
 2. Coase, "The Problem of Social Cost," *JL&E*, October 1960
 - a. "Section II. The Reciprocal Nature of the Problem:" "The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?" p. 2
 - b. "If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect . . . is also a factor of production." p. 44
 - c. "The aim of . . . regulation should not be to eliminate smoke pollution but rather to secure the optimum amount of smoke pollution, this being the amount which will maximise the value of production." p. 42

3. Meanings for Stigler:
 - a. (1) Market for externalities: with fully defined rights, permit nonowner to purchase right from owner; optimality as Pareto optimality: exhaustion of gains from trade
 - b. (2) Allocative neutrality: final resource allocation is invariant with initial assignment of rights: most valued use will receive resources, either through owner not selling or former nonowner buying
4. Assumptions:
 - a. Requires zero transaction costs
 - i. Cooter: *New Palgrave*, vol. 1, 469: "I have argued that the forms of market failure are too diverse to be subsumed under a reasonably circumspect concept of transaction costs, and, consequently, the transaction cost interpretation of the Coase Theorem should be regarded as false or as a tautology whose truth is achieved by inflating the definition of transaction costs."
 - b. Requires other assumptions, elaborated and critiqued
 - i. Indifference to existing distributions of income and wealth (taken as given)
 - a. Also, e.g., that an individual's buying and selling prices are the same
 - b. "If assignment of rights is irrelevant, why not give me your wallet?"
 - ii. Indifference to the resulting distributions of income and wealth, and to resulting price-cost structure
 - iii. Existing system of legal and moral rules, including rules governing access to and use of private property, taken as given
 - iv. Existing social power structure, e.g., control of government
 - v. Existing technology, resources and tastes, as well as existing distribution of capacity to derive utility from consumption and other economic activity
 - vi. Optimality as meaning individual adjustment through trade; only individual preferences to count (problem of which individuals)
 - vii. Existence of a market for externalities, or acceptance of nonmarket as indicative of no gains from trade
 - a. Equivalent to saying "what is, is and ought to be"
 - b. Problem of larger numbers and organization costs
 - viii. A bounded consumption set: survival

- a. Planetary survival (Greenhouse effect?)
 - ix. Perfect competition, or large number case, or indifference to market structure
 - x. Sufficient knowledge (ambiguous in practice: costly acquisition; unequal possession of information)
 - xi. That a local rather than the largest maximum is acceptable as the optimum
 - 5. Historical significance of Stiglerian “Coase” Theorem
 - a. Counterrevolution against Pigovian welfare economics: no externality problem
 - i. Buchanan and Stubblebine: Pareto-relevant and Pareto-irrelevant externalities
 - ii. Stigler: no externality problem
 - b. Casuistry issue: finessing contrary conditions through adopting qualifying assumptions in order to logically reach desired result (as with Say’s Law): re both market for externalities and allocative neutrality
 - c. Central issues:
 - i. Desirability of market solutions
 - ii. Sufficiency of market solutions
 - iii. Legitimization of market per se
 - iv. Allocative neutrality
 - a. A more straightforward, nonideological treatment would stipulate and consider that positive and unequal transaction costs yield different allocative results
 - iv. Casuistry versus study of actual factors at work in the economy and which produce the actually realized externalities, allocations, and distributions
 - a. “Maximization of value of production” not a simple matter
 - i. E.g., productivity etc. a matter of legal definition of output
 - 6. Coase: mainstream neoclassical microeconomics fails to give effect to transaction costs and thereby fails to indicate how institutions determine allocation; allocative solutions are not unique
- C. Posner and the Maximization of Wealth
 - 1. Law should/does maximize wealth
 - 2. Circularity argument
 - 3. Function of courts is determining rights and wealth maximization: “I am not a potted plant.”

- a. Recognition, if not affirmation, of inevitable judicial activism
- 4. Role of fundamental assumption as to whose interests are to count

6. REGULATION AND DEREGULATION

- A. Dual nature of rights: dual nature of regulation: control and protect
 - 1. regulation is relative, not absolute
- B. Regulation fundamental, not epiphenomenal
- C. Regulation both governs and is governed by power
 - 1. Functional with regard to whose interests count
 - 2. Aspect of contest to control government
- D. Society as number of regulatory systems
 - 1. Law, morality, market, interpersonal interaction
 - 2. Society as system(s) of governance: nominally private, public
 - 3. Market as both regulatory system and governed by regulation
- E. Regulation as functional equivalent of rights in protection of interests
- F. Regulation as mode of change of rights
 - 1. Deregulation and regulatory reform as functional equivalent of regulation as source of rights and as change of rights
 - a. Regulation protects Alpha against Beta; deregulation protects Beta against Alpha
 - 2. Role of selective perception critical
 - 3. Selective nature of deregulation and regulation
 - 4. Regulation, deregulation, and regulatory reform are functionally equivalent re protecting interests
- G. Rights, regulation, deregulation, and regulatory reform all govern efficient outcomes
 - 1. Efficiency as function of rights, not rights as function of efficiency
 - 2. Property valuation function of rights function of regulation, deregulation
 - 3. Value of output maximization function of rights of function regulation, deregulation
- H. Economic theory makes assumptions re rights and interest protection which are often juxtaposed to regulation so as to imply propriety of deregulation
 - 1. Role of implicit normative premises in re whose interests are to count
- I. Regulatory system (administrative regulation, e.g., of public utilities): as function of rights per statutes and court decisions, and rights as function of administrative regulation, e.g., via pricing systems

7. THE COMPENSATION PROBLEM

1. Paradigm case: airport expansion
 - a. Conflict of what expectations are to be presumed either per se or as reasonably held
2. Eminent Domain versus Police Power
 - a. Nature of the two principles
 - b. Problem not as to process, substance, or valuation in eminent domain, but as to applicability of eminent domain principles to areas hitherto treated under police power principles
3. Conflicting conceptions of rights, including property rights:
 - a. Social theory: rights are socially-legally established protection of interests; are subject to revision, destruction; otherwise amounts to reification and absolutist legitimation
 - b. Absolute theory: rights are pre-eminent to government and are meaningless unless fully protected, which includes full compensation for loss or injury
4. Principle of selective perception: of injury, of evidence of injury, of when injury constitutes legal damage
 - a. Widespread, perhaps inevitable: e.g., injury due to ordinary conduct of competition not seen as constituting legal damage, whereas other activities are perceived and treated differently; e.g., differential abilities of economic actors to introduce changes (e.g., technological) which arguably injure others
 - b. In practice, used to generate or sustain arguments for one side or another in litigation; also manifests and reinforces particular conceptions of economic role of government
 - c. Argument: serious differences between what is typically perceived and what is present in reality
5. Fifth Amendment Takings Clause
 - a. “. . . not shall private property be taken for public use, without just compensation.”
 - b. Necessity for principles governing application
 - i. As to scope, e.g., police power actions, entrepreneurial actions
 - ii. As to conditions under which it applies or purposes to which it is instrumental
 - iii. “Must pay for” implies market as only valuation process: seashore property versus porno shops
 - c. These principles are normative in that they represent attempts to determine what should govern application of taking clause

6. Representative principles intended to normatively guide the administration or application of taking clause
 - a. Frank Michelman, 1967
 - i. Utility: efficiency gains, demoralization costs, and settlement costs
 - a. Compensation to be paid whenever settlement costs are lower than both demoralization costs and efficiency gains
 - ii. Fairness:
 - a. Principles:
 - i. Social arrangements should assure to each participant the maximum liberty consistent with like liberty on the part of every other participant
 - ii. An arrangement entailing differences in treatment is just so long as (a) everyone has a chance to attain the positions to which differential treatments attach, and (b) the arrangement can reasonably be supposed to work out to the advantage of every participant, and especially the one to whom accrues the least advantageous treatment provided for by the arrangement in question
 - b. Result:
 - i. Analogous to the equal liberty principle would be a rule forbidding all efficiency-motivated social undertakings, which have the prima facie effect of impairing 'liberties' unequally, unless corrective measures are employed to equalize impacts. The second principle, however, would permit a departure from this uncompromising rule of full compensation if it could be shown that some other rule should be expected to work out best for each person insofar as his interests are affected by the social undertakings giving rise to occasions of compensation
 - ii. A decision not to compensate is not unfair so long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice
 - b. Joseph Sax, 1971
 - i. No compensation when government action involves resolution of conflicting demands between property owners

- ii. Recognition of public rights on a par with private rights (flood control, erosion, economic structure, scenic area, historic areas)
 - a. Put competing resource-users in a position of equality when each of them seeks to make a use that involves some imposition on his neighbors, and those demands are in conflict
 - b. The only appropriate question in determining whether or not compensation is due is whether an owner is being prohibited from making a use of his land that has no conflict-creating spillover effects. If the answer is affirmative, compensation is due for the value of land for that use.
 - c. With regard to conflicting interests in spillover cases: maximize the output of the entire resource base upon which competing claims of right are dependent, rather than the maintenance of the profitability of individual parcels of property
- c. Lawrence Berger, 1974
 - i. Both fairness and efficiency, but fairness is a matter of what accords with the community's sense of fairness and is open to widely different interpretations of injustice
 - ii. Efficiency: minimize sum of (i) nuisance costs (generated by harmful externalities), (ii) prevention costs (including non-administrative costs and opportunity costs incurred by the creator or the victim of a nuisance to reduce the level of nuisance costs), and (iii) administrative costs (the public and private costs of gathering information, negotiating, writing laws, enforcing laws, and arranging for the execution of nuisance-control measures)
 - iii. First-in-time approach: if a prior lawful activity is harmed by a subsequent lawful activity, both fairness and efficiency demand that the costs of eliminating the harm to the earlier lawful activity should be borne by the subsequent activity, so as to protect every owner in his reasonable expectations with regard to those variables under government control that affect its value
- d. Richard Epstein, 1985
 - i. Any removal by government of any right from an individual's bundle of rights is a taking and requires compensation, the only exceptions are (supposedly) very limited police power ends of prohibiting takings by private

- parties and the use of force or acts of defamation by private parties
 - ii. Yet permits assumptions modifying that rule, e.g., that some easement for the benefit of the public at large does exist, whether by long-standing custom or by some more overtly utilitarian view
 - e. Lawrence Blume and Daniel L. Rubinfeld, 1987
 - i. Economic argument for compensation is strongest in situations in which the risk of loss is large relative to individual wealth, or (as a practical alternative) large relative to the magnitude of the loss
 - f. Critique:
 - i. Of each principle, foregone here
 - ii. Enormous capacity for selective perception and application of each principle and thus enormous differences in application of any one principle
 - iii. Enormous differences between principles with regard to allocation, distribution, etc.
 - iv. Inescapable property-right determination: some interests affirmed, others denied, as property
7. Some general conclusions as to what actually happens or is going on in administration of taking clause
- a. Donald Black, 1987:
 - i. Modern trend toward greater degree of compensatory liability of organizations for the misfortunes of individuals
 - a. Strict and absolute standards of liability are more often applied to collectivities than to individuals
 - ii. Liability varies directly with social distance, including relational, status, and cultural differences
 - b. Samuels and Mercuro, 1979, 1980
 - i. General analysis
 - a. Dual nature of rights: inevitable injury
 - b. Reciprocal character of externalities: inevitable injury
 - c. Economic significance of rights (e.g., present value through capitalization) is dependent on wide variety of economic and other conditions - and is not intrinsic to the rights themselves
 - i. Legal determination that legal significance of rights -- that which law protects, is the income (and therefore capitalized value) which they produce—must assume certain conditions as permanent, those which yield the income and

- capitalized value; that is, negates possibility of erosion by market forces
- ii. Ubiquitous compensation problem, because of ubiquitous erosions of income and values
- d. Compensation problem is to determine which interest to protect, in each Alpha-Beta conflict, or to which potential losses existing values may be exposed
- e. Inevitability of noncompensated loss: someone must pay
 - i. Selective perception of losses
 - ii. Joint determination of rights and loss-compensation and loss-noncompensation: to grant or recognize a right is to impose a loss, to compensate is to grant or recognize a right and to impose a loss on whomever pays for the compensation
 - a. Impossibility of Lockean desideratum of protecting (property) rights through compensation requirement
 - b. Role of compensation in process of selectively redetermining rights, rather than merely protecting pre-existing rights
- f. Participation of legal system in social (re)construction of economy-society and in confronting radical indeterminacy, generating and resolving Alpha-Beta conflicts
 - i. Involves exercise of choice within and among matrix of legal principles: inevitable losses due to failure to choose a particular principle
 - ii. Involves choice within and among matrix of legal rights: ambiguity of property status quo and of future, e.g., including right to introduce technological change
- ii. Roles of the compensation principle:
 - a. Service in the framework of legal policy-making, as one in a larger matrix of principles
 - b. Service as a check on arbitrary and tyrannical power—function of selective perception
 - c. Psychic balm: the very presence of the compensation principle serves as psychic balm in face of radical determinacy, by obscuring the necessity of choice, by affirming the pretense of protected rights, by permitting the absorption of the reality of loss through

reference to high principle, and by soothing the realism of instrumentalism and rationality

- d. Legitimization of decisions which determine rights and losses: paradoxically legitimizing all legal change: by compensating in some or many cases, by having the principle available, it induces the acceptance of legal change without compensation; ostensibly a check on legal social control, it is itself a mode of social control; it is one means through which the injured are prepared to bear losses or educated to be willing to accept them
- iii. The resolution of the compensation problem
 - a. The determination of inevitable noncompensated losses through the joint determination of rights, losses and compensation, that is, the determination of compensation is part of the determination of rights
 - b. Demand for compensation as species of demand for rights
 - i. Pursued through ordinary litigation and lobbying
 - c. Supply side: constrained maximization decisions by legislators and judges, on basis of selectively provided information, selectively made normative-subjective judgments
 - i. Introduction of a right, that is, of a legal change, is a matter of either a rough benefit-cost judgment or a rough ideological or moral judgment as to propriety or desired-likely instrumental results
 - ii. Economies of scale in influencing legislation which favors the relatively wealthy, re access to courts and legislature, and re organizational costs
 - iii. Selective perception of reality in general and, in particular, of types of externalities, e.g, pecuniary versus technological
 - iv. Differential perceptions and treatments of prices and taxes as mode of diffusing losses
 - v. Strategic behavior in limiting change, controlling agenda of public discussion.

8. INEQUALITY AND THE EQUAL PROTECTION CLAUSE

- 1. Sen Antonio Independent School District et al V. Rodriguez et al, 411 US. 1 (1873)
 - a. Selective perception of state action in the production and/or reproduction of inequality
 - b. Unequal financing of public schools